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Mass Media - Court Proceedings - Mandatory Closure Statute Which Excludes the General Public and Press from Sexual Offense Trials Involving Minor Victims Violates the First Amendment

Margaret G. Laliberte

CASE NOTES

MASS MEDIA—COURT PROCEEDINGS—MANDATORY CLOSURE STATUTE WHICH EXCLUDES THE GENERAL PUBLIC AND PRESS FROM SEXUAL OFFENSE TRIALS INVOLVING MINOR VICTIMS VIOLATES THE FIRST AMENDMENT—*Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982).

Section 16A of Chapter 278 of the Massachusetts General Laws required that trial judges exclude the general public from trials involving specified sexual offenses against minors.[1] In April 1979, during hearings on preliminary motions in a trial for the rape of three minor girls, the trial judge invoked section 16A and ordered the courtroom closed. Globe Newspaper asked the court to remove the closure order and requested that it be allowed to intervene to assert its first and sixth amendment rights to be present at the trial and pre-trial hearings.[2] The trial court denied these motions and Globe

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1. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981) provided in pertinent part:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Massachusetts was the only state that had a mandatory closure provision for sexual offense trials involving minor victims. Other states have discretionary provisions. 102 S. Ct. at 2621 n.22. *See, e.g.*, ALA. CODE § 12-21-202 (1975); ARIZ. REV. STAT. ANN. § 9.3 (1973 Supp. 1982); GA. CODE ANN. § 81-1006 (1956 Supp. 1982); LA. REV. STAT. ANN. § 15:469.1 (West 1981); MISS. CONST. art. III, § 26; N.H. REV. STAT. ANN. § 632-A:8 (Supp. 1981); N.Y. JUD. LAW § 4 (McKinney 1968); N.C. GEN. STAT. § 15-166 (Supp. 1979); N.D. CENT. CODE § 27-01-02 (1974); UTAH CODE ANN. § 78-7-4 (1953); VT. STAT. ANN. tit. 12, § 1901 (1973). *See also* FLA. STAT. § 918.16 (1982) (providing for mandatory exclusion of the general public but not the press during testimony of minor victims).

2. The first amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The sixth amendment states in part that "in all criminal prosections, the accused shall

appealed.

Nine months after the criminal trial had ended, the Massachusetts Supreme Judicial Court dismissed Globe's appeal on the grounds of mootness. Nonetheless, because the issues presented were " 'significant and troublesome, and . . . capable of repetition yet evading review,' "[3] the court addressed the merits of the case. The Supreme Judicial Court found that section 16A did not require that the press be barred from the entire criminal trial,[4] rather, it only required mandatory closure of sex-offense trials during the testimony of minor victims and gave powers for discretionary closure of other segments of these trials. The court, noting that it would await a then pending United States Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*,[5] did not rule on Globe's constitutional claims.

Globe appealed to the United States Supreme Court which remanded the case to the Supreme Judicial Court for further consideration based on *Richmond Newspapers*. On remand, the court dismissed Globe's appeal,[6] stating that the *Richmond Newspapers* decision did not invalidate the mandatory closure requirement because section 16A was narrow in scope and protected the legitimate needs of victims.[7] The United States Supreme Court in *Globe Newspaper Co. v. Superior Court* reversed the decision of the Massachusetts Supreme Judicial Court, holding that the mandatory closure requirement of section 16A violates the first amendment.[8]

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enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

3. 379 Mass. 846, 401 N.E.2d, 362, (1981) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

4. The purpose of the statute, the court held, was "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." 379 Mass. 846, 401 N.E.2d at 369.

5. 448 U.S. 555 (1980) (plurality opinion).

6. The court relied on the fact that historically trials dealing with sexual assaults involving minor victims have been at least partially closed to the public. In addition, the court determined that state interests which were furthered by the mandatory closure rule would not be advanced by a case-by-case determination. Finally, the court decided that it was unnecessary to consider Globe's argument that the statute violated the sixth amendment rights of the criminal defendant because these rights, "at least in the context of this case,[could] only be asserted by the original criminal defendant." Globe Newspapers Co. v. Superior Ct., Mass. 846, 423 N.E. 2d 773 (1981).

7. *Id.* at 423 N.E.2d at 781.

8. 102 S. Ct. 2613 (1982). The Court did not address the sixth amendment claim

The Court first noted that the case was not moot under Article III, section 2 of the Constitution[9] because Globe served the Boston area, and it might at some future time be confronted with the mandatory closure statute.[10] In addition, since criminal trials are usually short in duration, a closure order would probably evade review.[11]

Concerning the first amendment issue, the Court concluded that, while the right of access to criminal trials is not specifically mentioned in the Constitution, the press and general public do have a right to attend criminal trials. The Court rejected a narrow, literal reading of the first amendment, reasoning that "the Framers were concerned with broad principles and wrote against a background of shared values and practices."[12] Moreover, the "right of access" plays an important part in the public's participation in the judicial process and in the government. Relying on *Mills v. Alabama*,[13] the Court stressed that a major purpose of the first amendment was to preserve the right to freely discuss governmental affairs.[14]

The Court then explained that historically the press and the general public have had access to criminal trials.[15] When the Constitution was adopted, criminal trials in the United

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102 S. Ct. at 2618 n.10. Justice Brennan wrote the majority opinion in which Justices White, Marshall, Blackmun, and Powell joined.

9. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. II, § 2.

10. 102 S. Ct. at 2618.

11. *Id.* (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976)).

12. 102 S. Ct. at 2619.

13. 384 U.S. 214, 218 (1966).

14. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." 102 S. Ct. at 2620. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 569 (19) (plurality opinion); 448 U.S. at 596-97 (Brennan, J., concurring); Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

15. 102 S. Ct. at 2619. Chief Justice Burger, writing for the dissent, strongly disagreed with the majority's contention. According to Burger, exclusion of the public from trials involving sexual offenses (especially those against minors) has had a long history. 102 S. Ct. at 2624 (Burger, C.J., dissenting). *See also* Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); Reagan v. United States, 202 F. 2d 488 (9th Cir. 1913); United States v. Geise, 158 F. Supp. 821, (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); State v. Purvis, 157 Conn. 198 (1968), *cert. denied*, 395 U.S. 928 (1969); Hogan v. State, 191 Ark. 437 (1935); Moore v. State, 151 Ga. 648 (1921), *appeal dismissed*, 260 U.S. 702 (1922).

States and in England had long been presumptively open.[16] This presumption of openness has endured, and in 1948 when the Court held that the due process clause forbids closed trials, no criminal trial,[17] either in federal, state, or municipal court, could be found that had been closed to the general public and press.[18]

The right of the general public and press to attend criminal trials, however, is not absolute. The Court noted that the State may close the courtroom upon showing a compelling interest in barring the press and general public access to sex-offense trials during the testimony of minor victims and showing that the closure is "narrowly tailored to serve that interest."[19] Because the circumstances in each case vary, the magnitude of the State's interest will change from trial to trial. Therefore, the Court determined that a case-by-case analysis will sufficiently protect the interests of the minor victim.[20] The trial court, when making a determination, should consider the age of the victim, the victim's level of psychological maturity, the crime involved, and the interests of the parents.[21]

Turning to the case at bar, Massachusetts asserted interests in protecting minor victims of sex crimes from further trauma and humiliation, and in encouraging these victims to appear in a credible manner.[22] The Court noted that since the names of victims were a matter of public record,[23] they may

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16. 102 S. Ct. at 2619 n.13. *See* Richmond Newspapers v. Virginia, 448 U.S. at 569.

17. *In Re* Oliver, 333 U.S. 257 (1948). It was stated in this case that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power." *Id.* at 270.

18. 102 S. Ct. at 2619.

19. *Id.* at 2620. *See, e.g.*, Brown v. Hartlage, 102 S. Ct. 1523, 1529 (1982); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-03 (1979); NAACP v. Button, 371 U.S. 415, 438 (1963). According to the Court, the Massachusetts statute was not a "narrowly tailored means of accomodating the State's asserted interest" since a case-by-case decision of the State's concern in the well-being of the minor victim would suffice. The Court stated that this would ensure that the right of the press and general public to be present at criminal trials would not be taken away unless the State's interest needs to be protected. 102 S. Ct. at 2621-22.

20. The case-by-case determination was first suggested by the plurality opinion in *Richmond Newspapers*, 102 S. Ct. at 2621 n.20.

21. 102 S. Ct. at 2621.

22. *Id.* at 2620.

23. The Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), held

have agreed to testify in front of the press.[24] Therefore, if closure were discretionary, the trial court might have found that closure was unnecessary.

Although section 16A bars the press and public from the courtroom during the testimony of the victims, the Court stressed that the press is nonetheless allowed access to the transcript, court personnel, or other sources that heard the testimony. The press, therefore, can publish the statements made during the testimony as well as the identity of the victim. The Court pointed out that if the State wants victims to come forward and believes that the victims will do so only if their testimony and their identity is kept secret, then section 16A is not effective in this regard.[25] Moreover, minor victims of sexual offenses are not the only victims who may hesitate to come forward and testify because of the publicity surrounding criminal trials. The Court concluded that the Massachusetts law providing for mandatory closure of sexual offense trials during the testimony of minor victims violates the right of access of the general public and press to criminal trials. As the plurality in *Richmond Newspapers* noted, " 'a presumption of openness inheres in the very nature of a criminal trial under our system of justice.' "[26]

The Court relied heavily on *Richmond Newspapers* which established that the press and general public have a first amendment right of access to criminal trials.[27] In *Richmond Newspapers*, the trial judge, relying on a discretionary closure statute, ordered the court closed to avoid any exchange of information during the recesses as to "who testified to what."[28]

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that the government cannot prevent the publication of the names of minor rape victims legally obtained from the public record. *See also* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

24. 102 S. Ct. at 2616 n.5.

25. *Id.* at 2622.

26. *Id.* (quoting 448 U.S. at 573).

27. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court held that the sixth amendment does not provide the public or press a right to attend a pretrial hearing. Moreover, while the Court noted that the sixth amendment right to a public trial is for the benefit of the defendant, it did not decide whether the first amendment guarantees a right of the access to criminal trials.

28. 448 U.S. at 560. The trial court relied on the state statute which provides in part:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

The United States Supreme Court held that case-by-case determinations are required before the right to access to a criminal trial may be taken away. The Court stated that "[a]bsent an overriding interest, articulated in findings, the trial of a criminal case must be open to the public."[29] The *Globe Newspaper* decision elaborated on *Richmond Newspapers* by holding that the press and public have a first amendment right not to be mandatorily excluded from sex-offense trials during the testimony of minor victims.

In both *Globe Newspaper* and *Richmond Newspapers*, there was a definite infringement of first amendment rights, and, in both cases, the Court utilized the "exacting scrutiny" test[30] to determine whether that infringement was justified. For the Court to uphold the infringement under the "exacting scrutiny" test, the State must prove (1) that there is a sufficiently important or compelling government interest, (2) that the means used are substantially related to the end, or the means chosen are narrowly tailored to serve the government interest, and (3) that the state action is the least onerous alternative for furthering the asserted government interest.[31]

Courts are confronted with a sensitive situation whenever a minor victim of a sexual crime is to testify. Public testimony may bring about further trauma, humiliation, and embarrassment for the victim. Massachusetts was the only state that had a mandatory closure rule that barred the press and public from sexual offense trials involving minor victims.[32] In addition, no state presently has a mandatory closure statute for sexual offense trials involving victims of majority age. The

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VA. CODE § 19.2-266 (Supp. 1980).

29. 448 U.S. at 581.

30. The Burger Court has applied an "exacting scrutiny" test when there has been a government infringement of first amendment rights. *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299, (1981); Widmar v. Vincent, 454 U.S. 263, 270, (1981); *In re* Primus, 436 U.S. 412, 432 (1978); Buckley v. Valeo, 424 U.S. 1, 16 (1976) (plurality opinion).

31. *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Thomas v. Review Bd., 450 U.S. 707 (1981); Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). Although the Court in *Globe Newspaper* did not expressly refer to the third prong, it appears that it did consider the third prong by stating that a trial court can determine on a case-by-case basis whether closure is required to protect the well-being of the minor victim. 102 S. Ct. at 2621. Thus, the Court was showing that mandatory closure is not the least onerous alternative.

32. *See supra* note 2.

distinction between majority and minority age for mandatory closure of sex-offense trials is not a logical distinction. The circumstances will vary from trial to trial. A person over eighteen may suffer the same trauma as a minor. On the other hand, a minor may be emotionally and psychologically mature enough to handle the press and public in the courtroom during his or her testimony.

Therefore, in holding that the decision of whether or not to exclude the press and public from a sexual offense trial during the testimony of a minor victim must be made on a case-by-case basis, the Court has taken into account the differing circumstances of each witness and trial. The *Globe Newspaper* decision protects two very important interests: the first amendment right of access of the press and general public to criminal trials, and, in appropriate instances, the welfare of the minor sexual offense victim during trial.

Deborah Manson

THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959—UNION MEMBERS' BILL OF RIGHTS PROTECTS RANK AND FILE UNION MEMBERS ONLY—*Finnegan v. Leu*, 456 U.S. 431 (1982).

In November 1977, fifteen members of Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, actively campaigned for the re-election of incumbent union president, Omar Brown. The fifteen members were also employed as business agents of the union. They were appointed to these positions in 1975 by Brown during his term as president. In December 1977, Harold Leu defeated Brown in his bid for the presidency of Local 20.[1]

Soon after taking office in January 1978, Leu discharged all the business agents who had been appointed by Brown during his previous term as Local 20 president.[2] Leu's reason for discharging the business agents was that the business agents were loyal to Brown. Therefore, they would undermine the new administration's policies and programs.[3]

The discharged business agents filed suit in federal district court on January 6, 1978, challenging their dismissal from union employment.[4] The action was based on alleged violations of the Labor Management Reporting and Disclosure Act of 1959 (the "Act").[5] Specifically, the business agents relied upon the "Bill of Rights" provisions in the Act, which guarantee equal voting rights and privileges to all union members,[6] as well as section 609[7] of the Act which makes it unlaw-

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1. Finnegan v. Leu, 456 U.S. 431, 433 (1982).

2. The bylaws of Local 20 provide that the president shall have the power to appoint and discharge the union's business agents. Termination of union employment does not affect union membership. *Id.* at 434.

3. *Id.*

4. *Id.*

5. 29 U.S.C. §§ 401-531 (1976) [hereinafter cited as "LMRDA"].

6. Labor Management and Disclosure Act of 1969, § 101, 29 U.S.C. § 411 (1976), known as the "Bill of Rights" of the Act, states in pertinent part:

> (1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the delib-

ful for the union or its representative, to "fine, suspend, expel or otherwise descipline any of its members for exercising any right to which he [sic] is entitled to under the provisions of the Act."[8]

The district court granted summary judgment for the union. The court stated that a union president had the right to discharge union employees from their appointed positions without violating the Act, so long as the employees' rights as members of the union were not affected.[9]

The United States Court of Appeals for the Sixth Circuit affirmed without a published opinion.[10] The United States Supreme Court affirmed, and held that the Act protects a union member from discipline by the union only with respect to his "rights or status as a member of the union," and not as an employee of the union.[11] In addition, the Court stated that the "Bill of Rights" provisions of the Act do not prohibit the termination of appointed union employees, nor do they prevent an elected union leader from selecting a staff which holds views compatible with his own.[12]

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erations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of the meetings: *Provided,* that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

7. Section 609 of the Act states:

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he [sic] is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

29 U.S.C. § 529 (1976).

8. *Id.*

9. Navarro v. Leu, 469 F. Supp. 832 (N.D. Ohio 1979).

10. Navarro v. Leu, 652 F.2d 58 (6th Cir. 1981).

11. 456 U.S. at 434.

12. *Id.* at 441.

Petitioners first claimed that their voting and free speech rights, as protected by the Act, were infringed upon by their discharge from union employment.[13] The Court addressed this issue by looking at the legislative history of the Act and the language of the relevant provisions. The Court noted that the primary objective of the statute was to ensure that labor unions would be governed democratically, and that union members would be guaranteed freedom of expression without fear of sanctions by union leaders.[14] The Court stated that the Act only applied to "rank and file union members," and that Congress did not intend to grant job security to union employees or officers when it enacted the statute.[15]

The petitioners argued further that their discharge from union employment resulted from their participation in the union campaign process. The petitioners alleged that this amounted to "discipline" under section 609 of the Act, and "that termination of union employment is therefore unlawful when predicated upon an employee's exercise of rights guaranteed to members under the Act."[16]

The Court also rejected this argument. The Court interpreted section 609 of the Act to mean that the term "discipline" applied only to actions which affect an individual's "rights or status as a member of the union."[17] The Court stated that termination of union employment did not affect such rights or status of union members, nor did it impinge upon any facet of union membership.[18] The Court observed that section 609 prohibits certain disciplinary actions from being taken against union *members*, whereas a separate section of the Act specifically deals with the disciplining of officers or agents of the union.[19] The Court noted that this was persuasive indication of Congress' intent to have section 609 refer

13. Petitioners relied specifically on sections 101(a)(1) and (2) of the Act, 29 U.S.C. § 411(a)(1) and (2). *See supra* note 6.

14. 456 U.S. at 435-36. The LMRDA was originally enacted to curb the abuses of power by union leadership. The legislation concentrated on regulation of union trusteeships and elections, but eventually other amendments were added which focused on increased protection of union members' basic rights. *Id.* at 435. *See also* 105 CONG. REC. 5806-07, 5811 (1959), II LEG. HIST. 1098-99.

15. 456 U.S. at 437.

16. *Id. See supra* note 7.

17. 456 U.S. at 437.

18. *Id.* at 438.

19. *Id. See* § 101(a)(5), 29 U.S.C. § 411(a)(5).

only to "punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee."[20]

Finally, the Court discussed whether the petitioners could plausibly maintain an independent action against the union for preventing petitioners from exercising their rights of free speech and assembly under section 102 of the Act.[21] The Court stated that an action based on section 102 is independent of an action based on section 609, and could be used "to redress an 'infringement' of 'rights secured' under Title I — without necessarily stating a violation of section 609."[22]

The Court noted that the petitioners clearly had the right under section 101(a)(1) and 101(a)(2) to campaign and vote for their candidate in the election. However, the Court found that in this instance the petitioners had not been wholly prevented from exercising those rights.[23] The petitioners themselves alleged only an "indirect interference"[24] with their membership rights, and this alone was not enough to convince the Court that there had been a violation of section 102 of the Act.

The Court concluded that it need not decide whether the termination of a union member from a union office was a violation of section 102, since the right of a union leader to select a staff with views compatible with his own overrode that section of the Act.[25]

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20. 456 U.S. at 438. *See* § 201(a)(5)(H) of the Act, 29 U.S.C. § 431(a)(5)(H). *See also* H.R. REP. No. 1147, 86th Cong., 1st Sess. 31 (1959) (conference Report on LMRDA of 1959).

21. Section 102 of the Act, 29 U.S.C. § 412 states in part: "[A]ny person whose rights secured by provisions of this chapter [Title I of the Act dealing with the Bill of Rights of the union members] have been infringed by any violation of this subchapter may bring a civil action in district court of the United States for such relief as may be appropriate."

Section 102 therefore seems duplicative of section 609 of the Act, but, as the Court explained, the two sections were designed to address different areas of conflict. Section 102 was introduced to enforce provisions of Title I by giving union members an individual right of action. Section 609 was designed to provide criminal penalties and focused primarily on election violations. 456 U.S. at 439-40 n.10.

22. 456 U.S. at 439. Section 609 applies to any disciplinary action taken in retaliation for a member exercising any right under the Act. *See supra* note 7. Section 102 only protects rights secured under Title I of the Act related to the Bill of Rights of the members. *See supra* note 21.

23. 456 U.S. at 440.

24. *Id.*

25. *Id.* at 440-41. The Court based its reasoning on both the Congressional in-

The basis of the Court decision was the legislative history and statutory text of relevant provisions of the Labor Management Reporting and Disclosure Act of 1959.[26] The Act was originally introduced into Congress as part of a plan to control the abuse of power by union leadership, specifically in the area of union elections.[27] In addition to developing regulations to govern union elections, Congress also enacted amendments which guaranteed basic voting and free speech rights to union members.[28] The Court noted that such safeguards were necessary to ensure a union member's freedom of expression without fear of reprisal by union leaders.[29]

The Court granted certiorari in this case in order to resolve a string of conflicting circuit court decisions.[30] Most notable were *Grand Lodge of International Machinists of America, AFL-CIO v. King*,[31] and *Newman v. Local 1101*,[32] two conflicting opinions regarding the validity of discharge from union employment under the Act.

In *Grand Lodge*, union members claimed that they were discharged from union employment because they actively supported a particular candidate in a union election.[33] Their campaign activity consisted of assembling with other members and openly supporting that particular candidate.

The United States Court of Appeals for the Ninth Circuit found that the right to engage in union politics was guaranteed to all members of the union by sections 101(a)(1) and 101(a)(2) of the Act. The court also stated that there was

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tent of the Act, and the fact that the bylaws of the union gave the president plenary powers to appoint and discharge the union's business agents at his discretion. The Court found that the Act's overriding objective "was to ensure that unions be democratically governed and responsive to the will of the union membership as expressed through open, periodic elections." Also, "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.* at 441.

26. 29 U.S.C. §§ 401-531.

27. H.R. REP. No. 741, 86th Cong., 1st Sess. 2 (1959) *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2424. *See supra* note 14.

28. *See supra* note 14.

29. 456 U.S. at 435-36.

30. *Id.* at 433. *See, e.g.*, Lamb v. Miller, 660 F.2d 792 (D.C. Cir. 1981); Maeira v. Pagan, 649 F.2d 8 (1st Cir. 1981); Newman v. Local 1101, Communications Workers of Am., AFL-CIO, 570 F.2d 439 (2nd Cir. 1981); Grand Lodge of the Int'l Machinists v. King, 335 F.2d 340 (9th Cir. 1964), *cert. denied*, 379 U.S. 920 (1964).

31. 335 F.2d 340 (9th Cir. 1964), *cert. denied*, 379 U.S. 920 (1964).

32. 570 F.2d 439 (2nd Cir. 1978).

33. 335 F.2d at 340.

nothing in the statutory language, nor in the legislative history of the Act, which indicated that these guarantees of free speech and voting rights were to be inapplicable to officer-members.[34] Additionally, the court found that section 609 of the Act did make it unlawful for a union to discharge union employees for exercising any right protected under the Act. The court also held that an action could be brought under section 102 by the union members to enforce the specific provisions of section 609.[35]

In *Newman,* members of the local union brought suit against the union, alleging a violation under the Act of their free speech rights as union members.[36] Appellee Newman had been removed from his position as job steward by union officials after engaging in disruptive conduct and speaking out at a union meeting.[37]

The United States Court of Appeals for the Second Circuit stated that a union employee, because he is already a union member, enjoys the rights of free speech and assembly provided by the Act. Therefore, suspension or discharge predicated on the exercise of these rights would be a violation of the Act.[38] However, the court stated that a union official has "certain duties" towards the labor organization, and once he accepts a union position and the obligation to carry out the union's policies, he may not engage in conduct which would be inconsistent with those duties.[39] To do so would be to risk discharge from the union office, as such conduct prevents effective union representation.[40]

The court in *Newman* held that the union could dis-

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34. *Id.* at 343. The defendant in this case argued unsuccessfully that Congress did intend for union officers to be excluded from the protective sections of Title I of the Act. The defendant called attention to the fact that, as originally enacted, § 101(a)(4) was applicable to both union "members or officers," yet as the bill passed through conference, the words "or officers" were deleted. Therefore, claimed the defendant, there was a Congressional intent to exclude union officers from the protection of Title I. The court rejected this argument, stating that Congress was merely getting rid of surplussage, since union officers were already union members. *Id.* at 343-44 n.12.

35. *Id.* at 344.

36. 570 F.2d 439 (2nd Cir. 1978). Specifically, members relied on sections 101(a)(2) and 609 of the Act, 29 U.S.C. § 411(a)(2), 529. *See supra* notes 6-7.

37. Plaintiff Newman contended that he was discharged for "his repeated expression of views in opposition to union leadership." 570 F.2d at 447.

38. *Id.* at 445.

39. *Id.*

40. *Id.*

charge the union employee from his position as job steward for unacceptable conduct, sections of the Act notwithstanding. The court noted that discharge under those circumstances would not be a violation of sections 101 or 609 of the Act, since Congress did not intend Title I of the Act to protect union employees or officers from removal from office.[41]

In resolving the conflict between the two cases, the *Finnegan* Court stated that it was apparent from the language of sections 101(a)(1),(2), and 609, and the legislative history of Title I, that Congress was only seeking to protect union *members* under the Act.[42] The Court maintained that Congress did not intend section 609 to create a system of job security for union employees.[43] The Court also stated that section 609 of the Act applied only to members, and therefore action taken against union employees or officers did not come within the scope of section 609 unless it directly impinged upon a member's rights as a member.[44]

In deciding this case the Court did not devise any new applications of the Labor Management Reporting and Disclosure Act of 1959. Rather, the Court simply handed down a decision which was a cautious interpretation of both the language of the Act and its legislative history. Perhaps the Court chose this approach because there were so many conflicting circuit court decisions on this issue.

In deciding that the Act was meant to protect rank and file union members only, and not union employees or officers, the Court was selective as to those sections of the Act's legislative history it reviewed. Nonetheless, the Court was adamant that the Act's main objective was to ensure union democracy.[45] However, the Court neatly passed over the issue of whether or not a different decision would be reached if a sec-

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41. *Id.* The court also stated: "We do not believe that Congress intended Title I of the Act to insulate union officials, employees, or agents from removal, or to permit a union representative who disagrees with its leadership to freeze himself in office on First Amendment grounds." *Id.*

42. 456 U.S. at 436-37. The Court chose to read the legislative history of section 101(a)(4) differently than did the court in *Grand Lodge.* The Court deemed it an important factor that Congress changed the original version of section 101(a)(4) of the Act from "member or officer" to simply "member." *Id.* at 437 n.7. This change was interpreted by the Court to evince Congressional intent that the Act apply only to union *members. Id. See supra* note 34.

43. 456 U.S. at 438.

44. *Id.*

45. *Id.* at 440.

tion 102 claim was presented by a non-policymaking employee. It would seem plausible that a nonconfidential member of the president's staff would be immune from discharge, since that member would not interfere with efficient union administration. The Court stated that this issue was not decided and would have to wait for another case.[46]

The Court also neglected to rule on the rights of an elected business agent, as opposed to one who is merely appointed to that office. If the business agent or similar officer is elected to an office, it appears that the Court would immunize him from discharge by the union president. Such a ruling would seem a logical extension of the Court's emphasis on its interpretation of the Act, that is, union democracy.[47] The Court's sole comment on this issue was that as long as the Act promotes fair elections and protects rank and file union members from capricious acts by union leaders then the objective of the Act has been met.[48]

Where does this leave the union member who does wish to participate in union politics? The Court concluded that his position is a precarious one, especially if the member is also a union officer or employee.[49] The union officer or employee must enter the field of union politics at his own risk; the Court gives no concrete rules as to what type of treatment would be acceptable under the Act. It merely says that a union president's prerogative to choose a compatible staff more clearly manifests the objective of the Act, than does safeguarding union employment.[50]

The Court held that the Labor Management Reporting and Disclosure Act protects a union member from discipline by the union only with respect to his rights as a member of the union, and not as an employee or officer of the union.[51] The Court also stated that the "Bill of Rights" provisions in the Act do not prohibit the termination of appointed union employees, especially when they come into conflict with an elected union leader's need to select his own staff.[52] The Court

46. *Id.* at 441 n.11.
47. *Id.* at 441.
48. *Id.* at 437.
49. *Id.* at 442.
50. *Id.*
51. *Id.* at 437-38.
52. *Id.*

has issued a warning to union officers who wish to participate in union politics: Enter at your own risk; only union "members" are protected under the "Bill of Rights" provisions of the Labor Management Reporting and Disclosure Act of 1959.

Christopher Bruni

REAL PROPERTY—PROSPECTIVE TENANT DENIED HOUSING BECAUSE OF ADULTS-ONLY POLICY HAS CAUSE OF ACTION UNDER FOURTEENTH AMENDMENT AND FAIR HOUSING ACT—*Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982).

Robert Halet was refused an apartment because of an adults-only rental policy that excluded his son. He filed suit[1] in federal court against the apartment owner, Wend Investment Co., and the County of Los Angeles asserting that the rental policy was racially discriminatory and infringed upon his fundamental right to live with his family. Halet charged that the policy violated the fourteenth amendment,[2] the Civil Rights Act of 1964,[3] Title VIII of the Civil Rights Act of 1968 (Fair Housing Act),[4] and 42 U.S.C. sections 1981-1983.[5]

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1. The suit was filed as a class action by Sander Michael Halet (the child), by his father and guardian ad litem, Robert Halet, on behalf of themselves and others similarly situated, and by the Children Project of the Church of Life. Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

2. U.S. CONST. amend. XIV, § 1 provides, in pertinent part: "[No state shall] deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 42 U.S.C. § 2000d (1976) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

4. 42 U.S.C. §§ 3601-3619 (1976). The Fair Housing Act provides in pertinent part:

> [I]t shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

42 U.S.C. § 3604 (1976).

> (a) The rights granted by section . . . 3604 . . . of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

42 U.S.C. § 3612 (1976).

5. 42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the

Halet's racial claim is novel because he is white; moreover, the fair housing statute he invoked specifically protects against discrimination only on the basis of race, religion, sex, and national origin.[6]

The District Court for the Central District of California dismissed the complaint against defendant Wend on two grounds. The court found the case moot because Wend had dropped its policy against renting to families with children.[7] Further, the court held that Halet had failed to state a claim upon which relief could be granted. The district court also dismissed the defendant County, without leave to amend, finding that the discrimination was not invidious and the state action was insufficient to support a claim based upon the fourteenth amendment and 42 U.S.C. section 1983.[8] Finally,

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> same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

42 U.S.C. § 1982 (1976) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

43 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

6. Halet's claim of racial discrimination was based on the argument that discrimination against children has the effect of discriminating against blacks and Hispanics because statistically those groups have more children than do whites. Clearly Halet could not argue that he, as a white, had been discriminated against on the basis of his race. Halet v. Wend Inv. Co., 672 F.2d 1305, 1307 n.1 (9th Cir. 1982).

7. After Halet filed his claim, the City of Los Angeles passed an ordinance prohibiting adults-only rental policies. Although the apartment unit in question was not affected by that ordinance, since it lay outside the city limits, Wend voluntarily dropped the exclusionary policy for all its units, stating that it wanted to maintain a uniform policy. *Id.* at 1307.

8. Halet's initial complaint alleged merely that the County leased the land to Wend. In his opposition to the defendant's motion to dismiss (and in his appellate brief), Halet alleged in addition that the County 1) owned the land leased to Wend for the apartment complex, 2) used federal and state funds to acquire and prepare the land as part of a large redevelopment project, 3) leased the land for the public benefit in providing housing and included in the leased terms prohibition of racial and religious discrimination, 4) had final approval of all building plans, and 5) con-

the court noted that since children are not an insular minority, the rental policy was subject to only rational review. The policy withstood this lesser degree of scrutiny.[9]

In a brief unanimous opinion,[10] the Court of Appeals for the Ninth Circuit reversed the district court's holding on mootness and state action, thereby allowing Halet to proceed with his constitutional challenge against both defendants. In deciding the mootness issue, the circuit court followed well-established precedent "controlling voluntary abandonment of a challenged activity."[11] When a defendant has voluntarily ceased the activity, the tests are whether there is a reasonable expectation that the alleged violation will recur and whether interim relief or events have completely eradicated the effects of the violation.[12] The court of appeals found that Wend's mere statement that it had dropped the challenged rental policy simply did not meet these tests. The district court had thus erred in finding in that statement a sufficient demonstration of mootness.

Although the district court had not expressly addressed the issue of standing, the court of appeals raised it on its own initiative.[13] The court discussed the classic requirement of standing: A party must be personally injured by the challenged activity and must assert its own interests rather than those of a third party.[14] The court went on to state that these

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trolled the use of the apartment and the amount of rents charged the tenants. Halet further alleged that Wend must abide by the conditions of the lease and that it paid a percentage of the rental receipts to the County. Halet v. Wend Inv. Co., 672 F.2d 1305, 1310 (9th Cir. 1982). The district court, however, refused to allow Halet to amend his complaint to allege these additional facts.

9. See United States v. Carolene Prod. Co, 304 U.S. 144, 152-53 n.4 (1938), where Justice Stone suggested, in an often quoted note, that "prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry."

10. Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

11 *See* County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (challenged practices of hiring firemen, voluntarily abandoned); United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (voluntary resignation from allegedly illegal interlocking corporate directorates). These cases also control when a *promise* to abandon has been made.

12. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

13. Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir. 1982). Even if the trial court erred regarding jurisdiction, its decision will be affirmed if the complaint failed to state a cause of action. *See* Shipley v. United States, 608 F.2d 770, 773-74 (9th Cir. 1979).

14. Halet v. Wend Inv. Co. 672 F.2d 1305, 1308 (9th Cir. 1982). The court noted that Article III requires only the injury. But "prudential interests," the object of

requirements may be waived in some discrimination cases. For example, a white person may bring a racial discrimination claim if that person is the most or only effective adversary.[15] However, since Halet was a less effective adversary than a nonwhite parent with young children would have been, he had no standing to assert *racial discrimination* claims under the fourteenth amendment or under the Civil Rights Act, sections 1981, 1982, 1983, or 2000d.[16]

The court, however, had no difficulty granting Halet standing to raise a racial discrimination claim under section 3604 of the Fair Housing Act.[17] In reaching its conclusion the court relied upon *Gladstone, Realtors v. Village of Bellwood.*[18] In *Gladstone,* the plaintiffs were the village and six individuals, four of whom were village residents (only two of the individuals were black). The individual plaintiffs claimed to have been injured as homeowners of Bellwood, where the defendants allegedly had carried out racial steering practices[19] in violation of section 3604. The asserted injury lay in being

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which is to limit access to the courts to those parties best suited to assert a claim, have led the Supreme Court to add the further requirement that the party assert only its own interests. *See, e.g.,* Warth v. Seldin, 422 U.S. 490 (1975).

15. Halet v. Wend Inv. Co. 672 F.2d 1305, 1308 (9th Cir. 1982). The court distinguished *Halet* from Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) and Barrows v. Williams, 346 U.S. 249 (1953). The plaintiffs in *Sullivan* were a white homeowner and his tenant, a black. They challenged the cancellation of the homeowner's recreational club membership because Sullivan had protested the club's refusal to allow him to assign his membership to the tenant. The Court held that Sullivan, a Causasian, should have been allowed to sue under section 1982, even though he had not been discriminated against personally on a racial basis. In *Barrows* a white person was sued for damages by his former neighbors when he sold his house to a black person in violation of a restrictive covenant. The Court held that allowing Barrows to be sued would amount to state action which would interfere with Barrows' right to the equal protection of the laws against racial discrimination in housing. See also Shelley v. Kraemer, 334 U.S. 1 (1948), where it was held that racially restrictive covenants could not be enforced against black purchasers because such enforcement would be state action denying equal protection to blacks under the fourteenth amendment. In *Halet,* however, the court asserted that other more appropriate plaintiffs could be found. 672 F.2d at 1308-09.

16. In Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976), the Fourth Circuit held that relief under section 1981 was limited to correcting racial discrimination. Similarly, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court noted that section 1982 dealt only with racial discrimination. By its terms section 2000d is limited to protection from discrimination on the grounds of "race, color, or national origin." *See supra* note 3.

17. *See supra* note 4.

18. 441 U.S. 91 (1979).

19. Racial steering entails "directing prospective home buyers interested in equivalent properties to different areas according to their race." 441 U.S. at 94.

denied the benefits of living in an integrated society. Plaintiffs did not claim, in other words, that they had themselves been subject to the realtors' practices.

The *Gladstone* Court evaluated the legislative history of the Fair Housing Act, and held that Congress had intended standing under the Act to be as broad as article III of the Constitution allows, that is, not subject to any prudential requirement of asserting only one's own interests.[20] Hence the plaintiffs had standing to assert the rights of others, i.e., those actually subject to the steering activity, provided that the article III minimum requirements had been met.

The *Halet* court's opinion stated, without comment, that Halet claimed that he was denied an apartment because of a rental policy that allegedly infringed upon the rights of racial minorities. The court declared that this was sufficient to support Halet's standing under the Act.[21] The court also held without comment that Halet could challenge Wend's rental policy under section 1983[22] and the fourteenth amendment "on the grounds that it violate[d] Halet's right to raise a family and discriminate[d] against families with children."[23]

The court next addressed whether the district court had erroneously dismissed the County as a defendant. The court began by noting that a plaintiff must be able to show state action in order to state a claim under either the fourteenth amendment or section 1983.[24] The court noted the circumstances of state involvement that Halet had alleged in his opposition to the motion to dismiss and in his appellate brief.[25] The court found that in dismissing the County without leave to amend, the district court had abused its discretion; a trier of fact, applying established principles,[26] could have found

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20. *Id.* at 109. The Court characterized the minimum requirements of article III as follows: "[A] plaintiff must always have suffered a 'distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." *Id.* at 100 (quoting Warth v. Seldin, 442 U.S. 440, 501 (1975)).

21. Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

22. *See supra* note 5.

23. Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

24. *Id.* The Court explained that the "under color of state law" requirement of section 1983 was equivalent to the fourteenth amendment's state action requirement.

25. *See supra* note 8.

26. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the Supreme Court established the principles controlling state action in cases of discrimination that appear to be purely private, as in *Halet*. In *Burton* a private restaurant had refused service to the black plaintiff. The court in that case found that the state was

state action in *Halet* if the facts alleged by Halet were true.[27]

The court proceeded to decide whether the alleged discrimination against children entitled Halet to state a claim under the fourteenth amendment. The district court had dismissed that claim, finding that the adults-only policy withstood rational review. The court of appeals, however, held that strict scrutiny of a classification (here, families with young children) *was* required by equal protection and due process when the classification impermissibly interfered with the exercise of a "fundamental right."[28] Halet was attempting to exercise the fundamental right of privacy.

In finding the right of privacy in the facts of *Halet,* the court relied heavily upon *Moore v. City of East Cleveland.*[29] *Moore* held that the right of family members to live together was part of the fundamental right of privacy.[30] The *Moore* Court held further that although the family is not beyond regulation, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[31]

The *Halet* court reasoned that if *Moore* held that the right of extended family members to live together was fundamental, a fundamental right was even more clearly involved when members of an immediate family desired to live together. The court buttressed its position by stating that there

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actually a "joint participant" in the restaurant's enterprise. The public city garage in which the restaurant leased space was dedicated to "public uses," and the costs of land acquisition, construction, and maintenance were defrayed by rental income as well as parking receipts, loans, and bonds. Justice Clark's majority opinion stressed that the determination of sufficient state involvement must be made within the framework of the particular circumstances of each case and that a precise formula is an impossibility. But once a sufficient nexus is found between the state and the challenged activity, "the proscriptions of the fourteenth amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726.

27. Halet v. Wend Inv. Co., 672 F.2d 1305, 1310 (9th Cir. 1982).

28. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) *cert. denied,* 451 U.S. 940 (1981); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

29. 431 U.S. 494 (1977) (plurality opinion).

30. *Id.* at 498-99. *Moore* involved a city zoning ordinance that had defined allowable "family" units to exclude the plaintiff, who lived with two grandchildren who were cousins rather than brothers.

31. *Id.* at 499.

exists a fundamental right to be free from government interference with decisions concerning family relationships.[32] Its statement parallels the *Moore* Court's declaration that numerous cases have consistently acknowledged a "private realm of family life" which the state is forbidden to enter.[33]

The court noted, however, that even though it had found state action that infringed upon a fundamental right, strict scrutiny of the challenged activity would not be triggered unless a *significant* deprivation of the right had taken place.[34] The court held, therefore, that on remand the district court was to consider if such a deprivation occurred in *Halet*. If so, the trial court was to then subject the adults-only policy to strict scrutiny.[35]

Finally, the circuit court found a cause of action for Halet's racial discrimination claim under section 3604 of the Fair Housing Act.[36] Halet argued that discrimination against children was an aspect of racial discrimination and therefore was proscribed by the Act. The court found support for this argument in the willingness of both lower federal courts and the Supreme Court to find forbidden discrimination in activities that have *either* a discriminatory *intent* or discriminatory *effect*, when the challenge is based upon a civil rights statute.[37] The *Halet* court held, without further comment, that

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32. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982).

33. 431 U.S. at 499, (quoting Prince v. Massachusettes, 321 U.S. 158, 166 (1944)).

34. The court cited two Ninth Circuit decisions that support this limitation upon strict scrutiny: Hawaii Boating Ass'n v. Water Transp. Facilities Div., 651 F.2d 661, 665 (9th Cir. 1981) (deprivation must be *significant penalty* on the right) and Socialist Workers Party v. March Fong Eu, 591 F.2d 1252, 1260 (9th Cir. 1978) (extent and nature of restriction's impact on the right must be examined). The court expressly held that the standard in *Hawaii Boating*, a "genuinely significant deprivation," was controlling in *Halet*. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982).

35. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982).

36. *See supra* note 4.

37. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment discrimination); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (housing discrimination); Metropolitan Hous. Dev. Co. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (housing); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (housing). *See also* Hsia, *The Effects Test: New Directions*, 17 SANTA CLARA L. REV. 777 (1977); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L.L. REV. 129 (1976). Under the "effects theory," a plaintiff establishes a prima facie case by alleging that the challenged activity has a discriminatory effect. The burden then shifts to the defendant to demonstrate that the effect is somehow justifiable. Note,

since Halet's complaint included documents that "seem[ed] to show some possibility of discriminatory effect," the allegations were sufficient to state a cause of action under the Fair Housing Act.[38] The court declined to decide, however, what standards it would apply to determine how important a discriminatory effect is in proving a violation of the Act. It noted that this determination would take place if and when the case came before the court again with a fully developed record.

The Ninth Circuit's approval of Halet's use of the fourteenth amendment and the Fair Housing Act to assert a claim of discrimination against children is unique among the circuits. It represents a straightforward application of the principles that underlie those laws. The court's holding regarding the "fundamental right to be free from state intrusion in decisions concerning family relationships"[39] is a logical application of *Moore*. The *Moore* Court had searched for basic reasons why certain family rights had been afforded protection under the Due Process Clause of the fourteenth amendment.[40] That Court reasoned generally that such protection could not be derived from precise terms of the Constitution. Rather, it explained that the Constitution protects the sanctity of the family because the tradition of the family is deeply rooted in United States history.[41] *Moore* went on to hold that that respect of family encompassed the extended as well as the nuclear family; the city of East Cleveland could not constitutionally "standardize" its citizens by forcing them all, through its zoning ordinances, to "live in certain narrowly defined family patterns."

Moore, then, stood for the principle that the state may not establish zones in which families—nuclear or ex-

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however, that the effects theory is applicable only to a statutory challenge. When the challenge has a *constitutional*, rather than statutory, basis, the Court has consistently required proof of *intent* to discriminate. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

38. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982). Halet provided a statistical table that indicated the percentages of households of blacks, Hispanics, whites, and those headed by women that included children. *Id.* at n.6.

39. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982).

40. 431 U.S. 494, 501 (1977).

41. *Id.* 503-04. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1177 (1980), notes that the Supreme Court's recent family law cases have "turned to tradition as a source of previously unrecognized aspects of the liberty protected by the due process clauses." In other words, in family cases the validity of substantive due process has been reaffirmed.

tended—may not live. *Halet* extended the *Moore* principle. Under *Halet* the state may not accomplish the same exclusionary results *indirectly* by permitting and controlling terms in an adults-only lease clause.[42]

The *Halet* decision marks the first time a circuit court has allowed a Fair Housing Act cause of action for discrimination against *children* in housing.[43] The basis upon which the court made its decision, however, is not new. Courts have applied the effects theory and have widely accepted the use of statistics to show that minorities were disproportionately affected by a challenged action.[44] Logically, if the discriminatory effect is "disproportionate enough,"[45] any correlation between race and challenged activity may be valid. Two district court cases illustrate this. The court in *United States v. Henshaw Brothers, Inc.*[46] found that a landlord's refusal to rent apartments to military personnel below the rank of major violated section 3604 because 99% of black military personnel held below-major rank.[47] In *United States v. Housing Authority of the City of Chickasaw*,[48] the challenged action was the city's requirement that only *citizens* of the city were eligible for housing in its housing authority units. Since the citizenry was exclusively white, that policy was clearly discriminatory in effect.[49]

A plaintiff who has been granted a cause of action under the effects theory, of course, merely is allowed to withstand an adversary's initial motion to dismiss for failure to state a cause of action. No consistent circuit court guidelines exist for determining at what point a sufficiently disproportionate effect has been shown to successfully prove a Fair Housing Act violation. Three circuits have found that the Act was violated when local governments had refused to zone for or construct

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42. Halet alleged that the County's lease with Wend forbade Wend to discriminate on a racial or religious basis in *its* leases with tenants. *See supra* note 8. Hence the County had already exercised its power to control Wend's rental policies.

43. Compare the cases cited *supra* note 34 and *infra* notes 44-47.

44. For example, the court in Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), found a cause of action under the Fair Housing Act because 95% of the individuals eligible for a delayed housing project were non-white (85% of the eligible individuals were black).

45. *See infra* notes 46-47 and accompanying text.

46. 401 F. Supp. 399 (D.C. Va. 1974).

47. *Id.* at 401-02.

48. 504 F. Supp. 716 (D.C. Ala. 1980).

49. *Id.* at 731-32.

low-income housing.[50] The Second Circuit Court of Appeals, on the other hand, has held[51] that refusal to rent to welfare recipients because they could not meet a particular rent-to-income ratio was not refusal on a racial basis. The court so held even though expert testimony indicated that eligibility of white households was four times as great as that of black households and ten times as great as that of Puerto Rican households.[52] The *Halet* court, however, declined at this juncture to indicate what guidelines it would adopt for the Ninth Circuit when presented with the question.

Only a handful of states have enacted legislation prohibiting housing discrimination against families with children.[53] In California all attempts to pass such legislation have so far been defeated.[54] The California practitioner should be aware, however, that the California Supreme Court held in *Marina Point v. Wolfson*,[55] that the Unruh Act[56] shields children or families with children from discrimination in rental housing. A few California county and municipal ordinances also prohibit discrimination on that basis.[57] In California, then, a victim of such discrimination may be more likely to receive relief by bringing an action in state court under *Marina Point*.

Most challenges to housing discrimination involve conduct of purely private landlords; the state action required to bring a *constitutional* challenge in federal court is usually lacking. The constitutional aspect of the *Halet* decision is therefore of limited use to most prospective plaintiffs. In find-

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50. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977); Metropolitan Hous. Dev. Co. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

51. Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir.) *cert. denied*, 423 U.S. 896 (1975).

52. *Id.* at 1117 (Mansfield, J., dissenting). *Boyd* was severely criticized, however, in the dissenting opinion and elsewhere, because the cases cited in the court's analysis were decisions based on constitutional rather than statutory grounds. *See* 509 F.2d at 1116 (Mansfield, J., dissenting); Hsia, *supra* note 37, at 799-800.

53. Arizona, ARIZ. REV. STAT. ANN. § 33-1317 (West Supp. 1982); Delaware, DEL. CODE ANN. tit. 25, § 6503 (1975); Massachusetts, MASS. GEN. LAWS ANN. ch. 151B, § 4.11 (West Supp. 1982); New Jersey, N.J. STAT. ANN. § 2A:42-101 (West Supp. 1982); New York, N.Y. REAL PROP. §§ 236-237 (McKinney Supp. 1981).

54. Dunaway & Blied, *Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA L. REV. 21, 24 n.12 (1979).

55. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

56. CAL. CIV. CODE §§ 51-52 (West 1982).

57. *See* Dunaway & Blied, *supra* note 54, at 51 n.146.

ing that racial discrimination *may* be an effect of discrimination against children, the Ninth Circuit made the Fair Housing Act available to all renters with children who have been denied rental housing because of their children. In so doing the court lent critical support to the fight for adequate housing.

The Ninth Circuit Court of Appeals in *Halet* held that discrimination against children in rental housing may infringe upon the constitutional right to privacy. Furthermore, a plaintiff who claims that such discrimination has a disproportionate impact upon minority groups has a cause of action under the federal Fair Housing Act. *Halet,* however, represents only the opening of the courtroom door. The court declined to establish the standards it will use to determine if a particular effect actually violates the Act. Without these standards the usefulness of the effects theory in litigation of certain racial discrimination cases remains problematic.

Margaret G. Laliberte